THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 644/2020

In the matter between:

THE CLICKS GROUP LTD	**FIRST APPELLANT**
NEW CLICKS SOUTH AFRICA (PTY) LTD	**SECOND APPELLANT**
UNICORN PHARMACEUTICALS (PTY) LTD	**THIRD APPELLANT**
CLICKS INVESTMENTS (PTY) LTD	**FOUTH APPELLANT**
CLICKS RETAILERS (PTY) LTD	**FIFTH APPELLANT**

and

THE INDEPENDENT COMMUNITY PHARMACY ASSOCIATION	**FIRST RESPONDENT**
THE MINISTER OF HEALTH	**SECOND RESPONDENT**
THE CHAIRPERSON OF THE SECTION 22(11) APPEAL COMMITTEE	**THIRD RESPONDENT**
THE DIRECTOR-GENERAL OF THE DEPARTMENT OF HEALTH	**FOURTH RESPONDENT**

Neutral Citation: *The Clicks Group Ltd and Others v The Independent Community Pharmacy Association and Others* (644/2020) [2021] ZASCA 167 (3 December 2021)

Coram: PETSE AP, MATHOPO, MAKGOKA and PLASKET JJA and KGOELE AJA

Heard: 31 August 2021

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Summary: Pharmacy Act 53 of 1974 (the Act) – regulation 6(d) of the Regulations relating to Ownership and Licencing of Pharmacies – beneficial interest in community pharmacies and manufacturing companies – revocation of retail and manufacturing licences – definition of 'beneficial interest' – constitutional challenge of s 22A of the Act – whether Clicks Group had contravened the Act and licensing regulations because entities within the Clicks Group owned community (retail) pharmacies while at the same time having a beneficial interest in a manufacturing company – Clicks Group has no beneficial interest in the pharmaceutical manufacturing companies – constitutional challenge has no merit.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Sievers AJ sitting as court of first instance):

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the high court is set aside and replaced with the following:

'The application is dismissed with costs including the costs of the two counsel where so employed.'

JUDGMENT

Mathopo JA (Petse AP, Plasket JA and Kgoele AJA concurring):

[1] The first respondent, the Independent Community Pharmacy Association (ICPA), is a registered non-profit company, which represents more than 1 000 independently owned community pharmacies, with 2 500 pharmacists and 20 000 supportive healthcare personnel. The ICPA lodged a complaint with the Department of Health against the first to fifth appellants (to whom I shall collectively refer to as the Clicks Group of Companies or Clicks Group). It sought the revocation of retail and manufacturing licences held within the Clicks Group on the basis that the Clicks Group contravened regulation 6*(d)* of the Regulations relating to the Ownership and Licencing of Pharmacies (the Regulations),[1] promulgated under s22A of the Pharmacy Act 53 of 1974 (the Act).

[2] Regulation 6*(d)* which is headed: 'Ownership of community pharmacies' reads as follows:

[1] Regulations relating to the Ownership and Licencing of Pharmacies GNR 553 of 25 April 2003.

'Any person may, subject to the provisions of regulation 7, own or have a beneficial interest in a community pharmacy in the Republic, on condition that such a person or in the case of a body corporate, the shareholder, director, trustee, beneficiary or member, as the case may be, of such body corporate –

(a) . . .

. . .

(d) is not the owner or the holder of any direct or indirect beneficial interest in a manufacturing pharmacy.'

[3] Section 22A of the Act reads as follows:

'**Ownership of pharmacies** – The Minister may prescribe who may own a pharmacy, the conditions under which such person may own such pharmacy, and the conditions upon which such authority may be withdrawn.'

[4] The Clicks Group operates over 500 community (retail) pharmacies, with over 2 000 pharmacy staff (pharmacists and pharmacists assistants) and 200 nursing practitioners. The third appellant, Unicorn Pharmaceuticals (Pty) Ltd (Unicorn), is a manufacturing pharmacy and a holder of 39 generic medicines under the regulatory regimes that apply to the sale of medicine.

[5] Clicks Retailers Pty Ltd (Retailers) is a leading provider of pharmaceutical services in South Africa and a leading retailer of health and beauty products. It operates approximately 470 licensed community pharmacies throughout the country. Retailers employs approximately 1830 pharmacists, 1430 pharmacist assistants and 315 nursing practitioners at those pharmacies. These pharmacies are part and parcel of Clicks stores that employ thousands more, both in-store and in the supply chain and corporate office infrastructure that supports the stores.

[6] The Clicks Group corporate structure is constituted as follows:

(a) Clicks Group is the holding company;

(b) It holds all the shares in New Clicks;

(c) New Clicks holds all the shares in Unicorn and in Clicks Investments (Pty) Ltd (Investments);

(d) Unicorn owns a licenced manufacturing pharmacy;

(e) Investments holds all the shares in Retailers;

(f) Retailers owns licenced community pharmacies countrywide.

[7] The ICPA summarised the complaint to the Department of Health as being 'that entities within the Clicks Group have a beneficial interest in community pharmacies while they also own a beneficial interest in a manufacturing pharmacy'. In its redress it requested the Director-General to: 'revoke the manufacturing pharmacy licence of Unicorn as well as all the retail pharmacy licences obtained after 30 May 2012, as they were granted on incorrect facts'. The ICPA also requested the Director-General to investigate Retailer's alleged contravention of the applicable statutory framework.

[8] The complaint was expanded as follows: (a) 'Clicks Retailers and Unicorn Pharmaceuticals (Pty) Ltd are amongst Clicks Group Ltd's subsidiaries and have "at the very least indirect beneficial interest in each other"'; (b) 'Unicorn is "clearly conducting business as a manufacturer of medicine"'; (c) 'in terms of the Pharmacy Act and the Licensing Regulations, "the Minister has prohibited manufacturers to have a direct or indirect beneficial interest in a retail pharmacy."'; and (d) that the conduct of the Clicks Group results in a conflict of interest between a patient's best interest and financial interests.

[9] The Director-General rejected the ICPA's complaint and held that neither Retailers nor its shareholders could be said to have a beneficial interest in Unicorn. In the underlying reasons for his decision, the Director-General stated the following:

'In view of the above, the Department may only exercise its power as conferred on it by law. It would thus not be permitted to disqualify Clicks Retailers from owning a community pharmacy outside of the preclusion provided for in regulation 6 of the [Licensing Regulations].'

[10] Dissatisfied with the outcome, the ICPA appealed to the Appeal Committee. Curiously, it no longer contended for the revocation of the licences. The ICPA submitted that although reference was specifically made to the revocation of the

licences of Unicorn and Retailers in the original complaint, the crux of the complaint was directed at investigating the perversities that were created by the vertical integration of the subsidiaries of the Clicks Group of Companies. In essence, the complaint was directed at the corporate structure of the Clicks Group of Companies on the basis that they had contravened the Act and licensing regulations because entities within the Clicks Group owned community pharmacists while at the same time having an interest in a manufacturing pharmacy.

[11] In arriving at its decision the Appeal Committee found that the Clicks Group of Companies did not contravene licencing regulations 6. The relevant part of the decision of the Appeal Committee is set out hereafter:

'The Appeal Committee has considered the arguments of the parties concerning the merits of this matter and finds that since the prohibition in Licensing regulation 6(d) is directed inter-alia at the body corporate (legal person in terms of Section 1 of the Pharmacy Act), the shareholder or the director of such body corporate from having "any direct or indirect beneficial interest" in manufacturing pharmacy, it stands to reason therefore that since assets of a company do not belong to the shareholder of the company but to the company itself, it may never be safely argued that because one company has 100% shareholding in another company, it can now be said that the company has beneficial interest in the other company.'

[12] The Appeal Committee concluded with the following statement:

'In this appeal it is common cause that Retailers own community pharmacies and looking at the corporate structure of the Clicks Group of companies, it is clear that neither Clicks Group, the 100% shareholder of New Clicks nor New Clicks, the 100% shareholder of Unicorn and Investments can be said [to] own or have beneficial interest in Retailers' community pharmacies since a shareholder may never be said to have a beneficial interest in the assets of the company other than his/her entitlements to the share of the profits or in the event that the company is liquidated, to the share of the surplus of the liquidation account.'

[13] After considering the ratio in *The Princess Estate and Gold Mining Co, Ltd v The Registrar of Mining Titles,*[2] the Appeal Committee held that since the assets of a company do not belong to the shareholder of the company but to the company itself,

[2] *The Princess Estate and Gold Mining Co, Ltd v The Registrar of Mining Titles* 1911 TPD 1066 at 1078.

it may never be safely argued that because one company has 100% shareholding in another company, it can now be said that the company has a beneficial interest in the other company.

[14] It is against those findings that the ICPA approached the high court to review and set aside the decision of the Appeal Committee. The high court agreed with the ICPA and rejected the findings of the Appeal Committee. In dismissing the Clicks Groups' contentions, it made a number of orders and, in sum, found that the Clicks Group structure was unlawful, it then remitted the matter to the Appeal Committee and alternatively to the Director-General in respect of various other orders not particularly relevant to this appeal.

[15] Of particular significance to this appeal is the finding of the high court that the Clicks Group had a beneficial interest in Unicorn as a result of its shareholding in various entities within the Group. It reasoned that New Clicks and Investments hold a beneficial interest in the manufacturing pharmacy owned by Unicorn and the community pharmacies owned by Retailers and this was especially so because as shareholders, New Clicks and Investments have financial interests in Unicorn and Retailers. It further held that the regulations recognised that where a community pharmacy is owned by an entity other than pharmacists themselves, it is undesirable for there to be a direct or indirect beneficial interest in both such a community pharmacy and a manufacturing pharmacy. It concluded that an entity having interests in both types of pharmacies would gain financially if the manufacturing pharmacy's products are promoted by the pharmacist in the community pharmacy over the other. In sum the high court expressed itself as follows:

'It would be artificial to contend that a company which owns 100% of the shares in a company does not have a direct or indirect beneficial interest in the business owned and operated by that company. The shareholder appoints directors to the company's board. The board determines what dividend is declared, which is then paid to the shareholder from the funds generated by the business. The proceeds of the winding up of the company go to its shareholder. The shareholder thus clearly has a beneficial interest in the business owned by the company.'

It seems to me that the high court equated a beneficial interest in a pharmacy owned by a company with the financial interest its shareholder has in the company. More is

to follow on this point later in the judgment. This appeal is with the leave of the high court.

[16] The appeal turns essentially on three main considerations namely: (a) the revocation of the licences; (b) beneficial interests; (c) a constitutional challenge to s 22A of the Act, an issue which the high court declined to deal with. I deal with these issues in turn.

Revocation of the licences

[17] In this Court the principal argument advanced by the Clicks Group is that the Director-General and the Appeal Committee were correct in dismissing the complaint and subsequent appeal brought by the first respondent as fatally flawed from the outset. The Clicks Group put up a spirited criticism of the high court's judgment by contending that the original complaint by the ICPA was explicitly for the revocation of licences held by Unicorn and Retailers. The complaint was misconceived because on appeal the ICPA changed tack by no longer alleging that Unicorn and Retailers contravened regulation 6*(d)* but rather that it was their holding company, Investments, New Clicks and the Clicks Group who contravened the regulation. This, according to the Clicks Group was a new matter as it resulted in the ICPA relying on a different cause of action but, paradoxically seeking the same relief, which was now in the form of the withdrawal of the licences without any justifiable basis.

[18] In short it was contended that the Director-General and the Appeal Committee did not have the power to revoke the licences even if they were found to have contravened regulation 6*(d)* simply because the jurisdictional factors for the revocation, suspension, cancellation, or withdrawal of the licences were not met by the ICPA.

[19] To counter these arguments, the ICPA at a later stage shifted the ground and repeated the same arguments that were raised before the Appeal Committee, which were endorsed by the high court. It emphasised that whilst particular reference was made to Unicorn and Retailers, the essence of the complaint was not directed at them but at the Clicks Group of companies. It submitted that there was no

mischaracterisation of the complaint and neither was a new cause of action advanced.

[20] The submission that there was no change in the original complaint is unsustainable. Although the ICPA sought different relief, its complaint remained unchanged; it was for the revocation of the licences held by Unicorn and Retailers. The ICPA persisted with the argument that the complaint was strictly directed at the structure of the Clicks entities, which contravened regulation 6*(d)* and the conditions under which retailers may own community pharmacies. The Appeal Committee concluded that the complaint was not directed at the original grant of the licences but rather the revocation or withdrawal of the licences on the basis that they were used in contravention of the Pharmacy Act and the Regulations. This change of tack is a new matter and overlooks the fact that documents accompanying the original complaint, namely the founding affidavit and letter of complaint, stated that the complaint was directed at the revocation of the licences of Unicorn and Retailers. In my view there was never any basis for the revocation of the licences.

[21] Another factor which militates against the ICPA is that it failed to adduce evidence that Unicorn and Retailers did not comply with licencing conditions as required by ss 22(7) and 22(10) of the Act and regulation 9*(d)*. In terms of the Act and the Regulations, a licence may only be cancelled, suspended or withdrawn after the pharmacy has been given a full and proper opportunity to explain why the licence in question should be cancelled or suspended. In my view the entire process offended the legality principle because there was no underlying power in the Director-General's purview to review complaints relating to the revocation of the licences.

[22] There is yet another reason why the argument of the ICPA is incorrect. In this case, Unicorn and Retailers were not asked for reasons or an explanation by the Department of Health following the complaint lodged by the ICPA. Retailers was only asked to make representations regarding the corporate structure which it complied with. Having not asked Unicorn and Retailers to make representations, the jurisdictional facts for the cancellation, suspension and withdrawal of the licence were not met. I sum up the position as I see it as follows. It was stressed in argument

by counsel for the Clicks Group that the ICPA first sought the revocation of licences on the basis of a contravention of regulation 6*(d)* and s22A. When it realised the shortcomings in its argument, it shifted ground and sought to attack the corporate structure of the Clicks Group. Against this view, we were urged to accept that the way the complaint was framed was without merit. First, Unicorn and Retailers did not contravene regulation 6*(d)*: Retailers is not a shareholder of Unicorn and neither does it hold a beneficial interest in Unicorn. Secondly, the Director-General did not have the power to revoke the licences. Lastly, the high court erred in not distinguishing the complaints against Unicorn and Retailers on the one hand and the complaint against the Clicks Group on the other. In doing so, the high court failed to recognise that the dismissal by the Appeal Committee was lawful. Ideally this should be the end of the matter. However, in the view that I take of this matter, it is necessary to consider other grounds of appeal. It is to the issue of beneficial interest that I now turn

Beneficial interest

[23] The nature of this argument will be better understood against the background of what follows. The concept of beneficial interest is derived from English law. It connotes someone who is not the legal owner of a thing but has a legal right to the benefits of ownership. The most helpful decision which I deal with first is the *Princess Estate and Gold Mining Co Ltd v The Registrar of Mining Titles*.[3] This case was the cornerstone of the Clicks Group argument. In that case, Wessels J said the following:

'But although our law does not recognise an equitable estate, it does admit of a person having an interest in property which is not registered in his name, and this interest does in some respects resemble the "beneficial interest" of the English law. To this extent our law does recognise a severance of interests. Thus, a trustee under an ante-nuptial contract or a trustee for church, building society or lodge, a curator of a lunatic or prodigal may have trust property registered in their names whilst the parties virtually interested are the spouses, the congregation, the members of the building society or lodge and the lunatic or prodigal.

. . .

The trustee under an ante-nuptial contract may be registered as the owner of land for the benefit of one of the spouses or of the children of the marriage. Here the trustee is vested

[3] The *Princess Estate and Gold Mining Co Ltd v The Registrar of Mining Titles* 1911 TPD 1066.

with the *nuda proprietas*, whilst the person entitled to the benefits flowing from the property may be said to be beneficially interested.

. . . .

So if land is registered in the name of the curator of a lunatic there are in fact two interests – a legal interest in the curator and another interest in the lunatic, which may be described as a "beneficial interest". . ..

Now let us see whether the same principle applies to the case of a company in liquidation.

. . .

A shareholder has no *jus in re* in any of the assets of the company; he can only lay claim to such a share of the profits as are awarded to him, or in case of liquidation to such a share in the surplus as he is entitled to according to the liquidation account. There is no severance of interests between the company and the shareholder, and, therefore, I fail to see how the latter can be said to have any "beneficial interest". Nor does it appear to me to make any difference that one person has bought up all the share. This can make no difference to the relationship between the sole shareholder and the company.

Unless we go to the length of giving to "beneficial interest" so wide a meaning as to include all persons who may in some way or other eventually derive a benefit from immovable property, I cannot see how a shareholder of a company or the successor to all the shareholders can be said to have a beneficial interest in the land of the company.'[4]

[24] This point was forcefully made by Corbett CJ in *Shipping Corporation of India*[5] as follows*:*

'It seems to me that, generally it is of cardinal importance to keep distinct the property rights of a company and those of its shareholders, even where the latter is a single entity, and that the only permissible deviation from this rule known to our law occurs in those (in practice) rare cases where the circumstances justify "piercing" or "lifting" the corporate veil.'

[25] A terse but useful explanation of the distinction between a shareholder and a company is to be found in the judgement of *Macaura v Nothern Assurance Company*[6] where the House of Lords held that a shareholder of a company does not have a beneficial interest in its underlying assets. In the same judgement, Lord Buckmaster said that 'no shareholder has right to any item of property owned by the company, for he has no legal or equitable interest therein'.

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[4] Fn 4 above at 1078-1080.

[5] *Shipping Corporation of India Ltd v Evdomon Corporation and Another* [1993] ZASCA 167; 1994 (1) SA 550 (A); [1994] 2 All SA 11 (A) para 43.

[6] *Macaura v Nothern Assurance Company* [1952] AC 619.

[26] More recently, this Court in *City Capital SA Property Holdings Limited v Chavonnes Badenhorst St Clair Cooper NO and Others*[7] endorsed the principle that a company is a legal entity distinct from its shareholders. Its property is its own and not that of its shareholders.

[27] The ICPA's argument as to why we should deviate from the above authorities is threefold. First, Investments has a beneficial interest in Retailers' pharmacies in that Investments is the sole shareholder of Retailers and the shareholder of Investments is New Clicks. In terms of regulation 6, New Clicks may not have a direct or indirect beneficial interest in a manufacturing pharmacy. New Clicks has such an interest because it is the sole shareholder of Unicorn, which owns the manufacturing pharmacy.

[28] Secondly, New Clicks has a beneficial interest in a community pharmacy through its 100% shareholding in Investments which, in turn, has 100% shareholding in Retailers, which owns the community pharmacy. This means that New Clicks cannot have a direct or indirect beneficial interest in a manufacturing pharmacy but, it does because it wholly owns Unicorn, which owns a manufacturing pharmacy.

[29] Thirdly, the thrust of the ICPA's complaints was that persons and entities within the Clicks Group have beneficial interests in community pharmacies, while at the same time having a beneficial interest in a manufacturing company. According to the ICPA the answer to whether regulation 6*(d)* has been contravened or not centres on two propositions: (a) is there an entity that owns or has a beneficial interest in a community pharmacy; and (b) does this entity own or have any direct or indirect beneficial interest in a manufacturing pharmacy. The ICPA states that regulation 6 does not only deal with the owners of community pharmacies but also with those having a beneficial interest in such pharmacies. It contended that a shareholder (New Clicks) of any entity with a beneficial interest in a community pharmacy (Investments) may not also have a direct or indirect beneficial interest in a manufacturing pharmacy (Unicorn).

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[7] *City Capital SA Property Holdings Limited Chavonnes Badenhorst St Clair Cooper NO and Others* [2017] ZASCA 177; 2018 (4) SA 71 (SCA) para 27.

[30] In essence, the ICPA took issue with the fact that under English law ownership can be separated into two parts, namely a legal estate and an equitable or beneficial estate. Relying on the case of *Lucas' Trustee v Ismail & Amod,*[8] it contended that that distinction does not exist in our law. It asserted that it would have been inconceivable for the legislature to have intended the use of the term 'beneficial interest' in the regulation to carry a similar meaning to the English concept. To shore up its argument it called in aid the judgment of the high court which held that '[i]t would be artificial to contend that a company which owns 100% of the shares in a company does not have a direct or indirect beneficial interest in the business owned and operated by that company'.

[31] Spurred on, no doubt by the high court's finding, the ICPA argued that in the context of regulation 6*(d)*, the term beneficial interest is a phrase of wide import intended to cover a wide range of relationships, including the relationship between a company and its shareholders and directors. It submitted that on a proper interpretation of regulation 6*(d)*, the Clicks Group of companies have an interest in both Unicorn and Retailers and this conduct falls foul of regulation 6*(d)*, which aims to prevent the same entity from holding beneficial interests in both a community and manufacturing pharmacies.

[32] To counter these arguments, the Clicks Group briefly indicated that neither Unicorn nor Retailers contravened the impugned regulation. As regards Retailers, it argued that neither it nor its shareholders hold a direct or indirect beneficial interest in a manufacturing pharmacy. It further contended that because none of the holding companies own community or retail pharmacies, it cannot be said that by virtue of their shareholding in Retailers and Unicorn, they or their shareholders have a beneficial interest in community pharmacies and that they are holders of any direct or indirect beneficial interest in a manufacturing pharmacy. Put simply, it cannot be said that because the holding companies hold shares in Unicorn and Retailers, they have beneficial interests in the underlying pharmacies held by the two entities.

[8] *Lucas' Trustee v Ismail & Amod* 1905 TS 239.

[33] It is now appropriate to consider whether the high court correctly reviewed and set aside the decision of the Appeal Committee. A good starting point is to first analyse the meaning of the words ‘beneficial interest’. The answer to this question depends on what is meant by beneficial interest in a pharmacy and whether it can be said that because the holding company (New Clicks) holds shares in Unicorn and Retailers, they have beneficial interests in the underlying pharmacies owned by the two entities. The Clicks Group contended that the answer is in the negative. On the other hand, the ICPA contended that the question should be answered in the affirmative; it proffers two questions that must be answered in determining whether New Clicks has a beneficial interest in the in the pharmacies owned by Unicorn and Retailers. First, is there an entity that owns or has beneficial interest in a community pharmacy? Secondly, does this entity have a direct or indirect beneficial interest in a manufacturing company?

[34] In my view, the structure of the Clicks Group represents separate and different juristic persons. New Clicks has no beneficial interest or control of the assets of Retailers, which assets are mainly Clicks Pharmacies. Consequently, New Clicks cannot exercise the rights that derive from Retailers’ community pharmacy licence. There is no evidence and neither has any been adduced by the ICPA that because New Clicks is a 100% shareholder of Unicorn, it gives instructions to the staff employed by Retailers on the benchmarks to be achieved in terms of minimum percentage of Unicorn products sold.

[35] It is equally not correct to contend that because New Clicks holds shares in Unicorn or Retailers, they have a beneficial interest in the underlying pharmacies owned by them. It is clear that New Clicks and the Clicks Group do not own a community pharmacy or retail pharmacy and thus do not contravene regulation 6*(d)*. Any suggestion that, by virtue of their shareholding in Retailers and Unicorn, they or their shareholders have a beneficial interest in a community pharmacy, or that they have a direct or indirect beneficial interest in a manufacturing pharmacy, is misplaced.

[36] It seems clear to me that the high court misconceived the correct legal position. The arguments raised by the ICPA as to why the English law cannot be

imported into our law is unsustainable. It should be borne in mind that a shareholder of a company does not have a beneficial interest in its underlying assets. This principle is deeply rooted in both our law and English law, from which the concept of beneficial interest is derived. The distinction between a shareholder and company's assets was explained in *Dadoo Ltd and Others v Krugersdorp Municipal Council* where Innes CJ said the following:

'A registered company is a legal *persona* distinct from its members who compose it. In the words of Lord MacNaghten (*Salomon v Salomon & Co* 1897 AC at 51), "the company is at law a different person altogether from the subscribers to its memorandum; and though it may be that, after incorporation, the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or a trustee for them." That result follows from the separate legal existence with which such corporations are by statute endowed, and the principle has been accepted in our practice. Nor is the position affected by the circumstance that a controlling interest in the concern may be held by a single member. This conception of the existence of a company as a separate entity distinct from its shareholders is no merely artificial and technical thing. It is a matter of substance; property vested in the company is not, and cannot be, regarded as vested in all or any of its members.'[9]

[37] It must be spelt out that property vested in a company cannot be regarded as vesting in any of its members (shareholders). A shareholder has no legal or equitable interest in the property of the company. Regulation 6*(d)* does not refer to beneficial owners of shares but to a direct or indirect beneficial interest in a pharmacy. On a purposive and textual interpretation, regulation 6*(d)* must be interpreted to be limited to a proscription of who may own a pharmacy, whether legally or beneficially. It would be invalid or *ultra vires* if it is interpreted to extend beyond ownership prescribed in s 22A.

[38] I do not think we can, with all the facts or evidence at our disposal, give the term 'beneficial interest' so wide a meaning so as to include the Clicks Group of companies. Similarly, I cannot see how it can be said that New Clicks has a beneficial interest in Unicorn and Retailers. It cannot be denied, as was said in the United Kingdom Supreme Court in *Sevilleja v Marex Financial* that '[a] share is not a

[9] *Dadoo Ltd and Others v Krugersdorp Municipal Council* 1920 AD 530 at 550-551.

proportionate part of a company's asset . . . Nor does it confer on the shareholder any legal or equitable interest in the company's assets'. [10]

[39] The suggestion that the Clicks Group interposed Investments to circumvent the mischief which the regulation sought to protect is misguided. This argument runs contrary to the concession by the ICPA that shareholders do not own assets of the company in a juridical sense but do have a beneficial interest in how the company and its assets perform. Equally misconceived is the contention that the mischief sought to be prevented was the minimisation of the risks of one entity promoting the medicines of the other, which would not be in the best interest of patients. The ICPA has not adduced any evidence to trigger regulation 6*(d)* that a conflict of interest exists in the Clicks Group, which may jeopardise the right of patients. I accept as correct the submission by Clicks Group of Companies that there is no scope for Retailers, the pharmacists employed by Retailers, Investments or any pharmacy in the Clicks Group to gain financially at the expense of patients or to prescribe and sell medicines to patients who do not need them.

[40] The ICPA has not shown a single instance of a patient being sold a Unicorn product by a pharmacist employed by Retailers to the prejudice of the patient or in circumstances where the patient did not need the medicine. The ICPA has not adduced any evidence to support its claims that the Clicks Group structure negatively affected the nature, quality, or extent of public access to medicines at Clicks pharmacies. It should have been easy for the ICPA to collect and collate such information if it existed. What further militates against the ICPA's case is that there is no evidence to suggest that Clicks, through its arrangement, has been able to reduce the costs of medicines to the extent that Unicorn products are generally amongst the lowest priced generic products available on the market.

[41] My conclusion on this aspect is that the cases which I have quoted above apply with equal force to the present case. I fully endorse those decisions as correctly reflecting our law. It follows that the submission that beneficial interest is based on English law and has no place in our law is misplaced. There is indeed a huge conceptual difference between a shareholder and a company. This principle

[10] *Sevilleja v Marex Financial* [2020] UKSC 31 at para 31

was reaffirmed in *Standard Bank of SA v Ocean Commodities Inc*[11] and in *Shipping Corporation of India*.[12] I now proceed to consider the constitutional challenge which the high court declined to deal with.

Constitutional challenge

[42] In short, the argument advanced on behalf of the ICPA is that interpreting s 22A narrowly imperils the patient's rights to have access to quality and affordable medicines as entrenched in s 27(1)*(a)* of the Constitution (right to health) and s 1*(c)* of the Constitution (rule of law). Another attack on the constitutionality of s 22A is that a narrow interpretation would lead to arbitrariness and offend the rule of law because it would only apply if specific owners of community pharmacies apply to obtain licences of manufacturing pharmacies but not if that owner interposes a legal person between it and the community or the manufacturing pharmacies, as was done by the Clicks Group with the interposition of Investments.

[43] As to the remedy, the ICPA submitted that a just and equitable order under s 172 of the Constitution would be to declare s 22A as contrary to ss 1*(c)* and 27 of the Constitution and therefore invalid, but that the order of invalidity be suspended for a period of two years to allow the Minister to rectify the situation. As an interim measure the ICPA proposed some reading-in to save the regulation from invalidity during the interim period whilst Parliament addresses the shortcoming in the Act.

[44] The validity of this argument depends on the construction to be placed on regulation 6*(d)* and s 22A. In *Chisuse and Others v Director-General, Department of Home Affairs and Another*, the Constitutional Court stated the position on statutory interpretation as follows:

'In interpreting statutory provisions, recourse is first had to the plain, ordinary, grammatical meaning of the words in question. Poetry and philosophical discourses may point to the malleability of words and the nebulousness of meaning, but, in legal interpretation, the ordinary understanding of the words should serve as a vital constraint on the interpretative

[11] *Standard Bank of SA v Ocean Commodities Inc* [1983] 1 All SA 145 (A); 1983 (1) SA 276 (A) 288 to 289

[12] *Shipping Corporation of India Ltd v Evdomon Corporation and Another* 1994 (1) SA 550 (A); [1994] 2 All SA 11 (A).

exercise, unless this interpretation would result in an absurdity. As this Court has previously noted in *Cool Ideas*, this principle has three broad riders, namely:

"(a) that statutory provisions should always be interpreted purposively;

(b) the relevant statutory provision must be properly contextualised; and

(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a)."

Judges must hesitate "to substitute what they regard as reasonable, sensible or business-like for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation".'[13]

[45] The purposive or contextual interpretation of legislation must, however, still remain faithful to the literal wording of the statute. This means that if no reasonable interpretation may be given to the statute at hand, then courts are required to declare the statute unconstitutional and invalid. It is now settled that this approach to interpretation is a unitary exercise.

[46] On the issue of s 22A, it was submitted that it must be read and interpreted in the manner that the Minister did not make a wide prohibition as contended by the ICPA. We were urged to accept that he could have done so if he wanted but chose to confine the prohibition to the company and its shareholders. With reference to regulation 6*(d),* it was contended that the regulation must not be interpreted in the light of empowering provision. To do so, it was argued, would render the regulation unlawful and *ultra vires*. As stated earlier, it was pointed out that the Minister may only prescribe who may own a pharmacy however, the Minister does not have the power to concern himself with the financial interest of the company.

[47] It seems clear to me that when the Minister promulgated the ownership regulations under s 22A, the purpose was to determine who may own a pharmacy and the conditions under which such a person may own a pharmacy. It was not intended to prescribe who may hold a financial interest in a pharmacy. In terms of s 22A the power of the Minister is only limited to 'who may own a pharmacy'. The high

[13] *Chisuse and Others v Director-General, Department of Home Affairs and Another* [2020] ZACC 20 paras 47 & 48.

court erred in equating a beneficial interest in a pharmacy owned by a company with the financial interest its shareholder has in the company. The reasoning of the high court is out of step with the legal principle that a shareholder has a real interest in a company in which he or she holds shares and some array of rights, but those rights are in relation to the company and not its assets.

[48] Regulation 6 can only be interpreted on the basis of its purpose under the enabling provision (s 22A), which is limited to a prescription of who may own a pharmacy whether legally or beneficially because it would be invalid if it were to extend beyond ownership which is prescribed in s 22A. In my view, departing from that rationale would do violence to the language of s 22A read with regulation 6*(d).* In the light of the foregoing, it can safely be concluded that when enacting s 22A the legislature must have been aware of the concept of a beneficial interest. Consequently, on a purposive and textual interpretation, the regulation must be interpreted to mean, someone who is the legal owner of the pharmacy or is legally entitled to the benefits of ownership of the pharmacy. Accordingly, the submission that the whole scheme of regulation 6*(d)* is to cast the net as widely as possible with the dominant purpose of preventing an alleged mischief in the Clicks' Group structure has no substance. The regulations cannot be used to interpret primary legislation and neither can they be used to extend the meaning of the words in the primary legislation. In my view, the constitutional challenge has no merit

[49] Before I conclude, there is one more important observation to make. This relates to a number of declaratory orders made by the high court. It set aside the decisions of the Director-General and the Appeal Committee despite its finding that Retailers and Unicorn were innocent of any wrongdoing. As a result of this error, it granted declaratory orders in relation to the decisions of the Director-General and the Appeal Committee. There was no basis for this as they were not sought before the Director-General and the Appeal Committee. Another fallacy relates to its declaratory order that the Clicks Group, New Clicks, Investment, Unicorn and Retailers contravened s 22A and regulation 6*(d).* The supreme irony and fatal flaw is that its findings did not implicate Unicorn and Retailers. Another misdirection relates to the issue of sanction to the Director-General and the Appeal Committee, the sanction was never part of the complaint.

[50] For these reasons the appeal must succeed. The following order is made:

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the high court is set aside and replaced with the following:

> 'The application is dismissed with costs including the costs of the two counsel where so employed.'

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R S Mathopo

Judge of Appeal

Makgoka JA (dissenting):

[51] I have had the benefit of reading the majority judgment prepared by my Colleague, Mathopo JA. Regrettably, I am unable to agree with the conclusion of the majority judgment upholding the appeal, and the reasons underpinning it. I would dismiss the appeal for the brief reasons set out below. The relevant facts giving rise to the dispute are common cause, and have been admirably set out in the majority judgment. They will therefore not be repeated in this judgment. However, for contextual purposes, I quote in full the two legislative enactments in issue, namely s 22A of the Pharmacy Act 53 of 1974 (the Act) and regulation 6 of the Regulations

on Ownership and Licensing of Pharmacies.[14]

[52] Section 22A reads as follows:

'Ownership of pharmacies

The Minister may prescribe who may own a pharmacy, the conditions under which such person may own such pharmacy, and the conditions upon which such authority may be withdrawn.'

[53] Regulation 6 provides as follows:

'Ownership of community pharmacies

'Any person may, subject to the provisions of regulation 7, own or have a beneficial interest in a community pharmacy in the Republic, on condition that such a person or in the case of a body corporate, the shareholder, director, trustee, beneficiary or member, as the case may be, of such body corporate –

(a) . . .

(b) . . .

(c) . . .

(d) is not the owner or the holder of any direct or indirect beneficial interest in a manufacturing pharmacy.'

[54] The primary issue is the proper interpretation of the above legislative scheme. The outcome of this interpretive exercise will inform a conclusion whether the corporate structure of the appellants, the Clicks Entities, contravenes the legislative scheme. Section 22A of the Act empowers the Minister to prescribe who may own a pharmacy, the conditions under which such a person may own such a pharmacy, and regulation 6 is a measure which the Minister considered necessary to achieve the purpose of s 22A. Regulation 6*(d)* prohibits an owner of a community pharmacy, or a person who owns or has a 'beneficial interest' in a community pharmacy, from owning, or having a 'beneficial interest' in, a manufacturing pharmacy. In the case of a corporate entity, such a prohibition extends to the shareholder, director, trustee, beneficiary or member of such entity.

[14] 'Regulations relating to the Ownership and Licensing of Pharmacies, GN R553, 25 April 2003.'

[55] With regard to s 22A, the parties differed as to its ambit and reach. The Clicks Entities favoured a restrictive, narrow construction of the section. The first respondent, the Independent Community Pharmacy Association (ICPA) contended for a wider interpretation. According to the Clicks Entities, the Minister's power conferred by the section is merely to determine who may own a pharmacy. Therefore, so went the submission, regulation 6*(d)* should be interpreted restrictively as if dealing only with ownership of pharmacies. This contention found favour with the Appeal Committee, which held that the regulations must be interpreted so as to avoid rendering them ultra vires the Act. This could only be done if the regulations are read as if dealing only with the ownership of pharmacies.

[56] The difficulty with this reasoning is that it places undue focus on 'ownership', and ignores the fact that s 22A also allows the Minister to prescribe the conditions under which a person may own a community pharmacy, and the conditions upon which such authority may be withdrawn. It also ignores the express and plain wording of regulation 6*(d)*, which, apart from ownership, also refers to 'direct or indirect beneficial interest'. Lastly, absent an attack on the regulations being *ultra vires*, they stand and must be applied, even were they (notionally) ultra vires the Act.[15]

[57] The high court concluded that to the extent that regulation 6*(d)* deals with the kind of entities which may have a direct or indirect beneficial interest in a pharmacy, it deals with conditions of ownership, and sets out when the authority for owning a pharmacy may be withdrawn. I cannot fault this reasoning. Differently put, the regulations allow one to own a community pharmacy. But that ownership is not unfettered. The regulations impose a condition to it, namely that a person should not have a beneficial interest in such a community pharmacy whilst such a person also has a direct or indirect beneficial interest in a manufacturing pharmacy. To that extent, this is a condition of ownership envisaged in both regulation 6*(d)* and s 22A, bearing in mind that the latter empowers the Minister to 'prescribe . . . the conditions under which such person may own' a pharmacy. Those conditions find expression in regulation 6*(d)*. Viewed in this light, s 22A and regulation 6*(d)* neatly complement each other.

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[15] *Merafong City Local Municipality v AngloGold Ashanti Limited* [2016] ZACC 35; 2017 (2) SA 211 (CC) para 41.

[58] I turn to the meaning of 'beneficial interest' as employed in regulation 6*(d)*. To recap, regulation 6*(d)* postulates two legs of the enquiry. The first leg is whether there is a person or an entity that owns or has a beneficial interest in a community pharmacy. The second leg is whether such person or entity, or the entity's shareholder, director, trustee, beneficiary or member, also owns or has a beneficial interest in a manufacturing pharmacy. But what does the concept of 'beneficial interest' mean in the context of regulation 6*(d)*?

[59] Counsel for the Clicks Entities placed much reliance upon the English law concept of 'beneficial interest', which connotes someone who, not being the legal owner of a thing, nevertheless has a right to the benefits of ownership. Counsel also relied upon certain dicta from *The Princess Estate*,[16] to make the point that a shareholder of a company does not have a beneficial interest in its underlying assets. Reliance was also placed on the settled principle of our law that a shareholder has no claim to the assets of a company. Reference was also made to various English authorities, including *Sevilleja v Marex*,[17] in which it was reiterated that a shareholder of a company has no legal or equitable interest in the property of the company. Lastly, counsel referred to *Standard Bank v Ocean Commodities*,[18] which is to the effect that in certain instances, the registered shareholder may hold the shares as the nominee of another, generally described as the 'beneficial owner' of the shares, despite this fact not appearing on the company's register.

[60] On these bases, the contention was advanced on behalf of the Clicks Entities that when regulation 6*(d)* refers to someone who owns or has a beneficial interest in a pharmacy, it means someone who is the legal owner of the pharmacy or is legally entitled to the benefits of ownership of the pharmacy. I have no qualms with the principles set out in the various authorities relied upon by counsel on behalf of the Clicks Entities. As stated already in the preceding paragraph, the principle that a shareholder has no claim to the assets of a company is well-settled in our law.[19]

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[16] *The Princess Estate and Gold Mining Co Ltd v The Registrar of Mining Titles* 1911 TPD 1066.
[17] *Sevilleja v Marex Financial Ltd* [2020] UKSC 31.
[18] *Standard Bank of South Africa Limited and Another v Ocean Commodities Inc and Others* 1983 (1) SA 276; [1983] 1 All SA 145 (A).
[19] *Dadoo Ltd and Others v Krugersdorp Municipal Council* 1920 AD 530 (AD); *Shipping Corporation of India Ltd v Evdomon Corporation and Another* 1994 (1) SA 550; [1994] 2 All SA 11 (A); *City Capital SA Property Holdings Limited v Chavonnes Badenhorst St Clair Cooper N O and Others* [2017]

[61] However, this principle does not assist with the central question in the present case, namely whether a person (natural or juristic) who has a beneficial interest in a community pharmacy, maintains a similar interest in a manufacturing pharmacy, in the context of regulation 6*(d)*. The concept of beneficial ownership as discussed in *Ocean Commodities* is also of no assistance. There, this Court confirmed the principle that although normally the person in whom the share vests is the registered shareholder in the books of the company, there are some instances where the registered shareholder may hold the shares as the nominee, ie agent, of another, generally described as the 'owner' or 'beneficial owner' of the shares, although this fact does not appear on the company's register.

[62] It remains to consider the English law concept of 'beneficial interest' as contended for on behalf of the Clicks Entities. At the outset I must state a conceptual difficulty with the notion of 'beneficial interest' as applied in English law bearing a similar meaning to that in regulation 6*(d)*. While in terms of s 39(1)*(c)* of the Constitution foreign law may be considered when interpreting the Bill of Rights,[20] the proper interpretation of regulation 6*(d)* is a matter of South African law in accordance with our established principles of interpretation of statutes. There is no need to have regard to foreign law case.[21]

[63] Regulation 6*(d)* should be construed using the conventional process of statutory interpretation, which is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. This is subject to three interrelated riders, namely that: (a) statutory provisions should always be interpreted purposively; (b) the relevant statutory provision must be properly contextualised; and (c) all statutes must be construed consistently with the

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ZASCA 177; 2018 (4) SA 71 (SCA).

[20] As noted by Klug, s 39(1)*(c)* has seeped into South Africa's constitutional jurisprudence beyond the interpretation of the Bill of Rights. See H Klug *The Constitution of South Africa: A Contextual Analysis* (2010) at 79-80.

[21] In *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) para 26, the Constitutional Court *warned* that 'the use of foreign precedent requires circumspection and acknowledgment that transplants require careful management'. See also the remarks of Chaskalson P in *S v Makwanyane* 1995 (3) SA 391; 1995 (6) BCLR 665 (CC) para 39.

Constitution.[22] In line with *Endumeni*[23], we must therefore consider, among others, the context in which the concept of beneficial interest appears in regulation 6*(d)*, the apparent purpose to which regulation 6*(d)* was directed and the material known to those responsible for enactment of the provision.

[64] As a matter of fact, the concept of 'beneficial interest' as understood and applied in the English law of property is not part of our law. As explained in *Lucas' Trustee*,[24] English law ownership of property can be separated into two parts, namely a legal estate and an equitable or beneficial estate, which can vest in two different persons at the same time. Our law does not recognise such division. Solomon J explained at 247-248:

'The English law holds that there can be two estates in land, the legal estate and the equitable or beneficial estate, and that these two estates can be vested in different persons at the same time; and under the old practice before the Judicature Acts those estates would be dealt with and cognisable in two separate courts of law – the common law courts and the courts of equity. Our law, as I understand it, does not recognise that there can be any such division of the dominium, or that there can be two estates in landed property, but that the person who is registered in the Deeds Office as the owner of the landed property is the one dominus of such property.'

[65] In *The Princess Estate*,[25] the issue was whether transfer of property from a company in liquidation to its sole shareholder was exempted from payment of stamp duty in terms of the Stamp Duties and Fees Act 30 of 1911.[26] The Act provided the exemption when the transfer caused 'no change of beneficial interest in the property transferred'.[27] It was held that even though shareholders have no legal right to the property (land) of the company, they may in certain instances be considered to have a 'beneficial interest' in the company's property. After noting that the words 'beneficial interest' had been borrowed from the English law, where it has acquired a

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[22] *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16; 2014 (8) BCLR 869; 2014 (4) SA 474 (CC) para 28.

[23] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262; 2012 (4) SA 593 (SCA) para 18; *Airports Company South Africa v Big Five Duty Free (Pty) Ltd* [2018] ZACC 33; 2019 (2) BCLR 165; 2019 (5) SA 1 (CC) para 29.

[24] *Lucas' Trustee v Ismail and Amod* 1905 TS 239 (TS).

[25] *The Princess Estate and Gold Mining Co Ltd v The Registrar of Mining Titles* 1911 TPD 1066.

[26] Act 30 of 1911 was repealed by s 35 of Act 59 of 1962, which in turn was repealed by s 34 of Act 77 of 1968, which Act has been repealed by s 103 of the Revenue Laws Amendment Act 60 of 2008.

[27] *The Princess Estate* at 1075.

technical meaning, Wessel J sounded this warning:

'The use of these technical words in a South African Stamp Duty Act is very unfortunate. By using technical terms which have in English law acquired a specific meaning it is difficult to avoid grafting English legal ideas on to our law which may be foreign to it.

Now the words, "beneficially interested," are used in connection with English real property, and as our law of fixed property differs *toto caelo* from that of England, it becomes at once manifest to what confusion the use of such words may lead us.'[28]

[66] After a survey of English law where the concept of 'beneficial interest' was used in various statutes, the learned judge continued:

'From the above references it seems clear to me that the Legislature of the Union never intended to import from England into this country all the technical meanings which have been given to the words "beneficially interested" in English statutes or in English decisions dealing with the complicated machinery of the English law of real property. I think that we should restrict the words "beneficially interested" to that meaning which it usually has when the term is used to call attention to a severance of interests . . .'[29]

[67] This Court had occasion in *EBN Trading (Pty) Ltd v Commissioner for Customs and Excise and Another*[30] to consider the concept of 'beneficial interest'. There the issue was whether the appellant, EBN, was an 'importer' in terms of the definition contained in s 1 of the Customs and Excise Act 91 of 1964 in respect of imported goods, for which EBN had provided finance for their procurement. The goods were EBN's security for the amounts owed to it by the importers. Upon arrival in the country, the Commissioner for Customs and Excise, and the Controller of Customs and Excise, Durban, detained the goods on the basis that customs duty had not been paid for them. EBN was not an importer in the ordinary sense of the word. However, one of the extended meanings contained in the definition of importer in the Act included any person who 'is beneficially interested in any way whatever in any goods imported'. After analysing the relationship between the actual importers and EBN, the Court concluded that EBN had a beneficial interest ('advantageous and profitable to it') in the context of the extended definition, and was, therefore, the 'importer' of the goods.

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[28] *The Princess Estate* at 1076.

[29] *The Princess Estate* at 1077.

[30] *EBN Trading (Pty) Ltd v Commissioner for Customs and Excise and Another* [2001] ZASCA 6; [2001] 3 All SA 117; 2001 (2) SA 1210 (SCA).

[68] *EBN Trading* emphasises the point that a contextual approach should be adopted, in accordance with the well-established principles. And, as cautioned in both *Lucas' Trustee* and *The Princess Estate*, it is not helpful to link the meaning of the term 'beneficial interest' when used in our statutory enactments to the English concept. In addition, I am of the view that it is undesirable to use concepts developed in the law of ownership to interpret a socio-constitutional provision such as regulation 6*(d)*.

[69] This brings me to the structure of the Clicks Entities, which is as follows: the first appellant, the Clicks Group, is the holding company of the Clicks Entities, which comprise the second appellant, New Clicks, the third appellant, Unicorn Pharmaceuticals, the fourth appellant, Clicks Investments, and the fifth appellant, Clicks Retailers. New Clicks is a wholly-owned (100 percent) subsidiary of the Clicks Group. In turn, New Clicks holds all shares in Unicorn Pharmaceuticals, a manufacturing pharmacy. New Clicks also holds all the shares in Clicks Investments, which in turn holds all the shares in Retailers, which owns and operates the community pharmacies.

[70] As mentioned already, to determine whether a corporate structure such as that of the Clicks Entities contravenes regulation 6*(d)*, it must be established first, that there is an entity that owns or has a beneficial interest in a community pharmacy. Next, it must be established whether such owner or the entity's shareholder, director, trustee, beneficiary or member, owns or has any direct or indirect beneficial interest in a manufacturing pharmacy.

[71] On behalf of the Clicks Entities, it was submitted that since the assets of a company do not belong to the shareholders of the company but to the company itself, even 100 percent shareholding in a company does not translate into a 'beneficial interest' in the company. Proceeding from that premise, it was submitted that, although Retailers owns all the community pharmacies, Clicks Investments does not own the pharmacies and does not have any rights to the benefits of ownership of the pharmacies, and that Clicks Investments does not have any beneficial interest in the pharmacies.

[72] This contention places undue focus on beneficial ownership, and fails to take into account that not only ownership is targeted, but also beneficial interest, whether directly or indirectly. The inclusion of the words ‘direct or indirect beneficial interest’ in regulation 6*(d)* is an indication that the legislature intended a wider scope of prohibition beyond beneficial ownership. It follows that the concept of ‘direct or indirect beneficial interest’ must be given a wider import than strict ownership.

[73] In any event, the fact that the assets of a company do not belong to the shareholders, does not necessarily mean that the shareholders do not have an interest in them. Of course they do. The high court summed it up neatly as follows (at para 18):

‘It would be artificial to contend that a company which owns 100% of the shares in a company does not have a direct or indirect beneficial interest in the business owned and operated by that company. The shareholder appoints directors to the company's board. The board determines what dividend is declared, which is then paid to the shareholder from the funds generated by the business. The proceeds of the winding up of the company go to its shareholder. The shareholder thus clearly has a beneficial interest in the business owned by the company.’

[74] The high court further pointed out, an entity having interests in both types of pharmacies would gain financially if the manufacturing pharmacy’s products are promoted by the pharmacists in the community pharmacies over other products. This could result in consumers not getting the best quality product at the best price. Products which are not strictly needed might be recommended and sold. The conflict of interest could also result in the manufacturing pharmacy favouring community pharmacies belonging to the same group above outside or independent pharmacies. This might affect the availability of products to customers. I agree with this reasoning.

[75] As explained in the explanatory affidavit of the Minister, the main mischief sought to be prevented by regulation 6*(d)* is the dispensing or recommendation of a medicine, supplied by a sufficiently commercially connected manufacturing pharmacy, where a generic substitute was available. The obvious purpose of the regulation was to ensure that pharmacists did not have a vested interest in the drugs

which they dispensed or recommended. Another danger is that if pharmacies are permitted to create their own affiliated manufacturers whom they control, directly or indirectly, they would directly be involved in setting prices and have strong incentives to keep those prices high. There is an inherent conflict of interest when a pharmacist is employed and remunerated by an entity which forms part of a group which also owns or has an interest in a manufacturing entity.

[76] The mischief aimed at by regulation 6*(d)* is very clear: simultaneous ownership or beneficial interest in both a community pharmacy and a manufacturing pharmacy. In my view, this is one case where the mischief intended to be addressed must receive some prominence when interpreting the provision. As such, a purposive and generous interpretation must be given to the regulation to achieve its apparent purpose, namely to prevent a conflict of interest and the entrenchment of monopolies in dispensing medicines. Anything less would render the regulation nugatory, as all what it would take to circumvent the purpose of the legislative scheme is a sophisticated corporate arrangement, such as interposing a juristic entity between an owner of a community pharmacy and that of a manufacturing pharmacy.

[77] Indeed, this is what happened here. To circumvent the prohibition of regulation 6*(d)*, the Clicks Entities' structure interposed Clicks Investments between New Clicks and Retailers. It is clear that the only reason for this is to attempt to circumvent the prohibition in the regulation. But the mischief sought to be addressed by the regulation does not fall away merely because of this. To achieve the purpose of regulation 6*(d)*, a court should incline to an interpretation that sees through this clever and sophisticated corporate structuring in order to give effect to the purpose of regulation 6*(d)*. The regulation must be given such construction as will advance the remedy rather than limit it.[31]

[78] It must also be borne in mind that the regulation squarely implicates a right enshrined in the Bill of Rights, namely the right to have access to health care

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[31] *Smyth and Others v Investec Bank Limited and Another* [2017] ZASCA 147; [2018] 1 All SA 1; 2018 (1) SA 494 (SCA) para 20.

services.[32] As the Constitutional Court recognised in *Minister of Health v New Clicks*,[33] that right embraces the right to access quality and affordable medicines. Two interpretive injunctions are relevant in this regard. The first is that where the court is faced with two interpretations, one constitutionally valid and the other not, the court must adopt the constitutionally valid interpretation, provided that to do so would not unduly strain the language of the statute.[34] The second is that where a provision is reasonably capable of two interpretations, the one that better promotes the spirit, purport and objects of the Bill of Rights should be adopted.[35]

[79] As stated already, according to the Clicks Entities, to be a beneficiary or to have a direct or indirect beneficial interest relates only to the benefits of ownership of the pharmacies. In my view, this construction of regulation 6*(d)* permits the clear circumvention of the apparent purpose of the regulation. It is not one that best promotes the spirit, purport and objects of the Bill of Rights, and in particular the right of access to health care services as stated above. By all accounts, both textually and contextually, the interpretation of regulation 6*(d)* advanced by ICPA is to be preferred. It gives effect to the purpose of the regulation and fulfills the injunction in s 39(2) of the Constitution to prefer an interpretation that best gives effect to the spirit, purport and objects of the Bill of Rights.

[80] In the light of the interpretation I prefer, I conclude that the Clicks corporate structure contravenes regulation 6*(d)* through the beneficial interests of Clicks Investments and New Clicks in both community pharmacies and the manufacturing pharmacy. This is how those beneficial interests occur. As to Clicks Investments, it

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[32] Section 27 of the Constitution of South Africa, 1996 provides:
'(1) Everyone has the right to have access to –
(a) Health care services, including reproductive health care;
(b) . . .
(c) . . .
(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
(3) No one may be refused emergency medical treatment.'

[33] *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* [2005] ZACC 14; 2006 (2) SA 311; 2006 (1) BCLR 1 (CC) para 704.

[34] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: in re Hyundai Motor Distributors (Pty) v Smit N O* [2000] ZACC 12; 2001 (1) SA 545 (CC) paras 23-25.

[35] *Wary Holdings (Pty) Ltd v Stalwo (Pty) and Another* [2008] ZACC 12; 2009 (1) SA 337 (CC) paras 46, 84, 107.

has, on the one hand, a beneficial interest in community pharmacies owned by Retailers as it is the sole shareholder of Retailers. On the other, Clicks Investments' sole shareholder, New Clicks, is the sole shareholder of Unicorn Pharmaceuticals, which owns a manufacturing pharmacy. As to New Clicks, it has a beneficial interest in community pharmacies as the sole shareholder of Clicks Investments, which in turn is the sole shareholder of Retailers, which owns the community pharmacies. The board of Retailers is controlled though Clicks Investments. As far as interest in a manufacturing pharmacy is concerned, New Clicks is the sole shareholder of Unicorn Pharmaceuticals, which owns the manufacturing pharmacy. It thus has a beneficial interest in that pharmacy.

[81] I have already concluded that s 22A is capable of a wider interpretation to enable the Minister to make regulations in terms thereof, to deal with issues beyond mere ownership of pharmacies. In view of that conclusion, like the high court, I deem it unnecessary to consider the constitutional challenge to the section.

[82] It remains to comment briefly on Clicks Entities' dilatory technical point – the only one it still pursues after many others were advanced, but dismissed by the Appeal Committee. Clicks Entities argue that ICPA's complaint was 'stillborn', because originally it was aimed at revoking the pharmacy licences of Unicorn Pharmaceuticals and Retailers, but 'replaced' that with a complaint that Clicks Investments and New Clicks are in contravention of regulation 6*(d)*. As correctly pointed out by ICPA's counsel, whilst particular reference was made to those entities in the original complaint, it is clear that the ICPA complained about the structure of the Clicks Group. But, the nature of the original complaint has become irrelevant for the following reasons. The corporate structure of the Clicks Entities was the complaint as formulated before the Appeal Committee. The Appeal Committee fully considered ICPA's complaint about Clicks Investments and New Clicks, and dismissed it in a comprehensive decision.

[83] That complaint was carried through in the founding affidavit in the high court,

and became the main focus of the submissions in that court. In this Court, we have similarly had the benefit of full and comprehensive argument on the real dispute between the parties. What is more, the Clicks Entities have not alleged any prejudice resulting from the ‘mutation’ of the complaint. I am unable to fathom any. The dispute between the parties is of public importance and as mentioned already, it implicates a constitutional right. In the light of these considerations, I take a view that it is inappropriate to non-suit ICPA on an overly technical and dilatory point, and which occasions no prejudice at all to any of the parties. Whereas technical points have their place, this is not the occasion for such. It amounts to placing form over substance, for which no real purpose would be served by it other than to delay the adjudication of the dispute between the parties.

[84] For all of these reasons, I would dismiss the appeal with costs, including the costs occasioned by the employment of two counsel.

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T M Makgoka

Judge of Appeal

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